IN THE SUPREME COURT OF IOWA

NO. 10-1815

STATE OF IOWA,

Plaintiff-Appellee

v

CHRISTINE LOCKHEART

Defendant-Appellant

APPEAL FROM THE DISTRICT COURT FOR SCOTT COUNTY

J.HOBART DARBYSHIRE, JUDGE

APPELLANT'S RESPONSE TO STATE'S PETITION FOR REHEARING

Court of Appeals decision July 11, 2012

AND SUGGESTION FOR BRIEFING SCHEDULE TO BE IMPOSED

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CERTIFICATE OF SERVICE

On July 20, 2012, I served the Appellant's Response to the State's Petition for rehearing on all parties to this appeal, by placing a copy in the US Mail addressed to Thomas Tauber, Hoover Office Bldg., Des Moines, IA 50319 and Michael Walton, Scott County Attorney, 400 West 4th Street Davenport, IA 52801, and I filed the same by depositing four copies in the US Mail addressed to the Clerk of the Supreme Court, 1111 Judicial Bldg, Des Moines, IA 50319.

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Gordon E. Allen

RESPONSE TO PETITION FOR REHEARING

1 Christine Lockheart does not resist the Petition for rehearing, simply because the issue of mootness, given the Executive Order of commutation entered by the Governor, is very much a serious and live issue. However, given the significant questions concerning the legality of that commutation Order, a schedule for briefing those overriding statutory and Constitutional issues should be established. Ms. Lockheart would suggest a period of thirty days for the parties to address those issues:

2. The Governor exercised his substantial and essentially unreviewable constitutional powers of executive clemency by granting to all 38 individuals affected by the Miller decision a commutation to a term of years. The uniform treatment of all defendants is arguably in violation of the Constitutional rights of these defendants to individual consideration of any and all mitigating circumstances as expressed in Miller v Alabama, ____ U.S. ____, 132 S. Ct., 2455, ___ L.Ed.2d ____ (2012). There the United States Supreme Court determined that to avoid a violation of the proportionality required by the 8th Amendment to the U.S. Consitution, "the state must provide 'some meaningful opportunity to obtain release base on demonstrated maturity and rehabilitation." Miller, Slip Op p. 17, citing Graham,, 560 U.S. ___, (Slip Op p. 24). Further the

Court suggested, "…we require it (the sentencing court) to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Miller, Slip Op. p. 17. And still further, the Court reiterated in Fn 8 on that same opinion page: "Our holding requires factfinders to attend to exactly such circumstances – to take into account the differences among defendants and crimes." (Slip Op p. 17-18).

Here, the Governor as "factfinder" and "sentencing Court" has failed exactly that. He has failed to take into account any of the mitigating factors discussed by the Supreme Court, but has irrevocably lumped them into a basket of uniformity. His decision is precluded by Miller.

3. Suggesting that a "precisely similar" (if one knows what that means) thing happened in Hodges v State, 491 S.W.2d 624 (Tenn. Crim App. 1972, rehearing 1973), the State argues that the case is moot. A careful reading of Hodges fails to disclose whether the commutation order at issue there was identical to that of Governor Branstad here, i.e. did it contain the language imposing a 60 year sentence with no possibility of parole, and eliminating earned good time credits? Without further briefing and analysis, it is difficult to credit Hodges as controlling.

4. There are other and more recent cases which need briefed and discussed from Illinois and the Seventh Circuit. For instance, in Simpson v Battaglia, 456 F.3d 585, 595 (7th Cir 2006), the Court held:

With respect to mootness, this case is governed by the result we reached in Madej v Briley, 371 F.3d 898 (7th Cir 2004)". …(The governor commuted the death sentence while on appeal for ineffective assistance of counsel) "to natural life. Rather than comply with the writ, the state sought vacatur, claiming the commutation rendered the resentencing moot."

In both cases, the defendant had a right to seek a sentence less than that imposed by the governor, and the commutation order did not render the claims of the defendant to be resentenced, moot.

In People v Mata, 217 Ill. 2d 535, the Supreme Court of Illinois came to a similar conclusion and explained:

"…the Governor's clemency power is also restricted in that the Governor may not increase the defendant's punishment. This restriction is apparent from the language of the Constitution…

"…the natural life sentence therefore exceeds the maximum term authorized by statute ….
Mata, at 542-3

Ms Lockheart suggests the same is applicable here, and these issues require briefing. Here, although the Miller Court gave Ms Lockheart an opportunity to show mitigating circumstances to the sentencing Court and seek a life sentence with parole opportunities, the Order of Governor Brandstand effectively denies her those constitutionally required parole opportunities for a period of sixty years. He

has, as in Illinois, illegally and unconstitutionally extended her sentence and denied her constitutional right to a proportional sentence.

5. Furthermore, the action of the governor is arguably in violation of several sections of the Iowa Code. The Constitutional provision giving him authority for clemency contains within a limitation "as provided by law". Conflicts with statutory provisions must be briefed and argued: for instance:

902.1 contemplates that an A felon, once commuted to a term of years is eligible for parole consideration –with no other limitation;

902.9 provides that the maximum sentence imposed is *by statute*. (emphasis added, -not by Governors);

903A.2 provides that while not used to shorten the sentence, earned time credits are computed for those serving life in the event that their sentence is commuted to a term of years. Here the Governor has abrogated that provision of the legislative scheme by fiat. The issue of whether that is a restraint imposed "by law", and thus a constitutional limitation on the governor's power must be briefed. Although earned time credits can be forfeited, the Governor is not one of those persons listed with that power under the statutory scheme

904A.4 provides for the powers and duties of the Board of Parole, Once commuted to a term of years, the Board is then authorized to interview,

investigate and grant paroles to those deserving. That is the contemplation of the Miller, court, and of the legislature, and is within the Constitutional rights to proportionality of this Defendant. All are violated by the Order of the Governor.

6. As explained by the Illinois Supreme Court in Mata and by the 7th Circuit, the Defendant's rights to due process have been abridged by the action of the Governor. Miller establishes a right to a proportional sentence, after consideration of mitigating factors including the age and circumstances of the defendant. That right has been denied Ms. Lockheart, without hearing and not based on her facts and circumstances, but simply because she is a member of a class of 38. That is a denial of procedural and substantive due process. Those issues must be briefed and argued.

CONCLUSION

As recognized by the authorities cited here, the power of clemency exercised by Governor Branstad is not unreviewable. There are limits. Delineation of those limits is a serious constitutional and statutory interpretative issue which should be briefed and argued. Ms Lockheart respectfully requests the opportunity to do just that, and asks that a briefing schedule be established, which schedule should be comparative in length to the significance of the constitutional issues raised by the action of the Governor, and the United States Supreme Court.

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